No. 14106.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEW WAH FOOK, as Guardian *ad Litem* for LEW SUEY YET, also known as LEW THEW YUT,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,

Appellee.

BRIEF FOR APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

ARLINE MARTIN,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, Calif.,

Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

The District Court had jurisdiction of the action under the provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903).

Judgment for the defendant that the plaintiff is not a citizen or national of the United States and that the plaintiff's cause of action be dismissed, was docketed and entered May 14, 1953. There being no dispute that said judgment was a final order, this Court has jurisdiction under the provisions of Title 28, U. S. C., Sections 1291 and 1294(1), of this appeal.

Statutes Involved.

Plaintiff's complaint was filed and served July 10, 1952, at a time when Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) was effective. While that Act was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, which became effective December 31, 1953, the savings clause in Section 405(a) of the latter Act preserves plaintiff's cause of action. Section 405(a) of the 1952 Act reads in part as follows:

> "Section 405(a). Nothing contained in this Act, . . . shall be construed to effect the validity . . . or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; . . ."

Section 903 of the 1940 Act reads as follows:

> "§903. *Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment*
>
> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of

the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Subchap. V, §503, 54 Stat. 1171."

Statement of the Case.

This is a case in which the plaintiff is the alleged son of a Chinese man who was admitted to the United States in 1923 by the Immigration and Naturalization Service, as the son of a native. The plaintiff was born in China, allegedly on September 9, 1935, as the third son of the alleged father, Lew Wah Fook.

When the plaintiff, the alleged number 3 son, and the number 1 and number 2 sons came to the United States, the Immigration and Naturalization Service detained them for hearings to determine whether or not they should be admitted as citizens. There is no dispute that the number 1 and number 2 sons were admitted by the Immigration Service. The plaintiff herein, however, after hearings duly held by the Immigration Service, was determined by that Service not to be a citizen of the United States and was excluded.

Before the cause of action provided in 8 U. S. C., Section 903, arose in 1940, the usual procedure would be for the plaintiff to seek a writ of habeas corpus for review of the Immigration Service Deportation or Exclusion Order, but that was never done in this case. Instead, plaintiff chose to file the present action, thereby getting a trial *de novo* in the District Court, as distinguished from a review of the Immigration Order which the Court would have given in a habeas corpus case.

Herbert Brownell, as Attorney General of the United States, being the "head of the Department" which denied

plaintiff the right or privilege of a citizen, to wit, the right to be admitted to the United States, on the ground that plaintiff was not a citizen, the Attorney General is the proper party defendant in the action.

The District Court, after hearing the testimony of the plaintiff, his alleged father, and his two alleged brothers, gave judgment for the defendant, that the plaintiff was not the person he claimed, was not a United States national, and dismissed plaintiff's cause of action.

The question raised by appellant on appeal is whether or not the decision of the District Court, the trier of the facts, is "clearly erroneous." Appellant relies on the language of *United States v. U. S. Gypsum Co.* (1948), 333 U. S. 364, in which the Court says:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Appellee believes the real question in the case is whether or not the plaintiff has sustained the burden of convincing the Court that he is the person he claims to be. A reading of the entire record gives rise to *no* firm conviction regarding the question of whether the plaintiff is, or is not, the son of the alleged father, Lew Wah Fook. In fact, after reading the entire record, there is anything but a firm conviction that the plaintiff is the person he claims to be.

Reduced to its simplest terms, the question might be stated thus: Has the plaintiff sustained his burden of proving his American citizenship, if the plaintiff and his father take the witness stand, and in a few short statements say "this is my son" and "this is my father"? Is a person, born in China, who has lived there all his life, entitled to receive a decree of the District Court that he is a citizen on such evidence? Clearly there is little to convince the mind of the Court under such circumstances. What then is the plaintiff's burden? If the Court is not convinced, and a reading of the entire record leaves the mind in a state of doubt, can it be said that the decision of the District Court should be reversed?

Summary of Argument.

I.

THE BURDEN IS ON THE PLAINTIFF TO PROVE HIS AMERICAN CITIZENSHIP AND THE PLAINTIFF FAILED TO SUSTAIN THAT BURDEN.

A. THE TRIAL COURT'S FINDINGS ARE NOT CLEARLY ERRONEOUS.

ARGUMENT.

I.

The Burden Is on the Plaintiff to Prove His American Citizenship, and the Plaintiff Failed to Sustain That Burden.

Many cases are cited in appellant's brief but all are cited to support one argument, which may be summed up in the words of appellant's brief [Tr. 15]:

> "here the evidence submitted by appellants to establish their citizenship is positive, uncontradicted and unimpeached. The alleged father and his two admitted sons gave testimony directly upon the issue. No contradictory or countervailing evidence has been submitted. We submit that under the well-settled principles mentioned above the findings of the court below adverse to the claim of appellant is 'clearly erroneous' within the meaning of 52(a) of the Federal Rules of Civil Procedure."

The pertinent provision of Rule 52(a) upon which appellants rely provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Let us see what facts were presented to the trial court by the plaintiff, as revealed by the record, and it may become clear why the trial court did not believe that plaintiff was the son of Lew Wah Fook.

The story is similar to many another Chinese story. The alleged father, Lew Wah Fook, was born in China,

entered the United States as the son of an American citizen, made two trips back to China before the war, and each time upon returning to the United States filled out a statement for the Immigration and Naturalization Service, reporting family facts, including the births of children. The chronology is as follows:

January 18, 1913	Lew Wah Fook, alleged father, born in Canton, China.
July 1923	Lew Wah Fook entered the United States as son of American citizen.
August 1929	Lew Wah Fook goes back to China, first time.
November 9, 1930	Lew Mon Soong, number 1 son, born (number 1 son admitted to U. S.)
April 15, 1931	Lew Wah Fook returns to U. S.
November 1932	Lew Wah Fook goes back to China, second time.
December 2, 1933	Lew Mon Hing, number 2 son, born (number 2 son admitted to U. S.)
May 1935	Lew Wah Fook returns to U. S.
September 9, 1935	Lew Suey Yut, sometimes spelled Leu Siu Ngoot, plaintiff in the action, alleged number 3 son, born.
December 17, 1946	Lew Mon Tang, alleged number 4 son, born in China (still in China).

Plaintiff's Exhibit 1 in evidence is Lew Wah Fook's statement on April 15, 1931, to the Immigration Service

on his return from his first trip to China, at which time he reported the birth of the number 1 son. Plaintiff's Exhibit 2, dated July 31, 1935, is Lew Wah Fook's statement to the Immigration Service on his return from his second trip to China, at which time he reported the birth of the second son.

The plaintiff herein, the alleged third son, was born in September, 1935, some four months after Lew Wah Fook returned to the United States. The next evidence we have with regard to the plaintiff is Lew Wah Fook's statement to the Immigration Service, referred to as Government's Exhibit A in evidence, on or about April 21, 1943. This was 8 or 9 years after the plaintiff was allegedly born, and what does Lew Wah Fook report to the Immigration Service at this time? The Transcript of Record [Tr. 71] shows that in 1943, on Government's Exhibit A, he stated regarding a third child, that the name was "Lew Siu Ngoot, sex female, age 9." Nine years after the birth of the third child, allegedly the plaintiff herein, the alleged father is reporting that *that* child was a female.

The next chronological event [Tr. 71] appears to be the questioning of Lew Wah Fook in 1951 [Govt. Ex. B in evidence, pp. 19, 20, 24-26], when the number 1, 2 and 3 sons applied for admission to the United States, at which time Lew Wah Fook told the Immigration Service that he didn't have any daughters, and when they asked him about his statement in 1943 [Govt. Ex. A] he said he didn't remember that application. It also appears from the Transcript [Tr. 71] that in 1951 Lew Wah Fook told the Immigration Service that he "never claimed" any daughters, but when shown the 1943 statement [Govt.

Ex. A] he then remembered he had listed the third child as "female."

At this stage of the evidence, a reasonable person was clearly entitled to believe that the plaintiff, the alleged third son, was not the child of Lew Wah Fook, but was some boy substituted for the third child which had been a girl.

What, if any, explanation was given regarding this testimony, and what other evidence on behalf of the plaintiff, if any, was given to corroborate the bare statements that the plaintiff is the son of Lew Wah Fook?

The record is barren of any other corroborating evidence. In fact, the record on behalf of the plaintiff is the barest minimum, and amounts to very little more than Lew Wah Fook's statement that "this is my son," and the plaintiff's statement (plaintiff's direct evidence [Tr. 60] was one page and a half long); that his father is Lew Wah Fook, and he was born September 9, 1935, and lived with the two brothers, the number 1 and 2 sons. Other than that the plaintiff answered yes to a few leading questions and that is all the evidence he brought before the District Court, and he asked the District Court to find upon that slim record, that he is an American citizen.

The father's explanation of the 1943 statement to the Immigration Service is at pages 20, 24 to 26 of Exhibit B. The explanation had to be a good one, and it is interesting to note that in court, it is placed in the field of Chinese custom where it is difficult to dispute.

Lew Wah Fook's explanation is as follows [Tr. 72-77]:

> "Q. (By Mr. Talan, for the Government): Referring to page 42 of Exhibit 1 attached to Defen-

dant's Exhibit B for identification, I ask you whether or not you gave the following answer to this question: 'On this form under "Describe all your children," it says two sons and one daughter, and it gives the third child, Lew Siu Ngoot, born CR 24-12- as female. How do you explain that?

A. I don't know how that come in, I couldn't explain to you. I never was claiming a daughter, I never had one before.'

Q. Did you make that answer?

A. I did make that statement. However, I want to explain that when I said I never claimed a daughter, I did claim a daughter, but I never claimed a daughter to the immigration office, that is what I meant.

The Court: You say you claim a daughter? What daughter do you claim? [68]

The Witness: I thought Lew Thew Yet was a daughter.

The Court: This is the party you were referring to?

The Witness: Yes. I thought he was a girl.

The Court: You mean to say that when this boy was born or when the child was born, you thought a girl was born, is that right?

The Witness: Yes, that's right.

The Court: When did you find out it wasn't a girl?

The Witness: When I was in the Army and I had my leave and went back to the village, I found out it was a boy.

The Court: That is the first time you found out this is a boy?

The Witness: That is my first time.

The Court: Who names Chinese children?

The Witness: The head of the family. In my case, it was my mother.

The Court: Didn't your mother or your wife ever write you after the birth of this child what the name of the child was?

The Witness: I received correspondence saying that my wife gave birth to a child and gave me the name and date of birth, and it was born and it was well, but I just assumed, it was a girl's name, I just assumed it was a daughter. It didn't mention specifically whether it was a boy or a girl, but it was a girl's name, so I deduced it was a girl. [69]

The Court: Don't you think it very strange a girl's name was given to a boy?

The Witness: This was an unusual case, yes.

The Court: May I ask the interpreter a question?

The Interpreter: Yes.

The Court: Have you ever heard in China where a girl's name was given to a boy?

The Interpreter: Yes, it has happened before. There is some sort of superstition. In fact, when I was a child, I had to have my Chinese name changed once because when I was a child I was very sickly and they felt the name had something to do with it, and it didn't suit my nature.

The Court: They didn't give you a girl's name?

The Interpreter: My second name could be interpreted that way.

The Court: There is no question this is a girl's name?

The Interpreter: Mine is questionable, but this is strictly a girl's name. The second name means pretty and a boy would never be called pretty. A girl's

name flows into three or four situations, where they are after something, pretty or esthetic or after a flower or after something that is very delicate. A boy's name would be something strong, something ferocious, like some sort of an animal or something [70] hard, like rock or steel. Chiang Kai Shek's name is rock.

The Court: It would seem to me mighty strange, considering the attitude of the Chinese relative to the difference between a boy and a girl, the male and the female, that they are always celebrating the birth of a boy. I don't know what they do with the girls. The girls in the Chinese race would be exterminated in three or four generations if the ratio we have in these cases applies. We don't have any girls at all.

The Interpreter: There is a time when you do have a girl and they don't mention it. The son they are very proud of. It is some sort of primogeniture.

The Court: It would take a lot of explanation as to why this was done, considering the fact that in China the sons are always the ones that are wanted, they are the ones that carry on the race, so it would take a lot of explanation as to why anybody would name a boy as a girl. It is pretty near inconceivable.

The Interpreter: It is very unusual.

The Court: Ask the witness this: You claim you didn't know this child was a boy until you went back to the village when you were in the Army in 1946 or 1947.

Mr. Brennan: 1946.

The Court: Yes, 1946.

The Witness: It was in 1946 that I first found out it was a boy instead of a girl. Naturally, I was very joyous of [71] the fact and I demanded an ex-

planation. The explanation was that my mother, who was a highly superstitious woman, at the time when the child was born, she went to this idol that they have and through this process of the idol, they shook these little bamboo sticks that have characters in them, and in that way she can get the name for the boy. The name came out from the bamboo sticks stating that it is a girl's name, the child would not live long, so it must be a girl. So subsequently when the child was born and they found out it was a boy, my mother sought to offset the spirits by giving the boy a girl's name, and instructed all the rest of the family not to tell me it was a boy, but to inform me, if they ever had the chance to write to me, to either keep quiet about it or tell me it was a girl.

The Court: When did you get this information? When did you find out this information?

The Witness: When I went back to China in 1946 and I saw my child, and by his features I knew it was a boy. I demanded an explanation. It was at that time that they told me what went on. Right away I was denied of a joyous celebration because it was a boy, and at that very moment when I found out, I wanted to make a ceremony and change the name to a boy's name, but my mother would not let me do so, stating the boy would have to reach the age of 18 before such a process [72] can be undertaken; otherwise, his health would be in jeopardy."

In answer to further questions by the government [T. R. 78-79] the alleged father stated that he claimed "one wife, two sons and one daughter" in his claim of dependents while he was in the Armed Forces, and made the same claim in income tax returns prior to 1943.

Further [T. R. 80-82], the father gave a fantastic explanation as to what was said to him when he first allegedly saw the third child was a boy when he had a furlow to China in 1946. The explanation was as follows:

"Q. (By Mr. Talan, for the government) What is the explanation that was given to you at that time for the fact that the third boy in that house bore the name that was given to him?

A. Prior to the actual birth, my wife was expecting any day, and my mother went to this temple and shook these bamboo sticks. The sticks that fell from this disclosed that I was not due to have a son during that year, and that if I do have, give birth to a son, that is my wife give birth to a son, that person will not live. So in order to offset that, in the event you do have a son, you have to give it a girl's name and you have to train it as if it was a girl until it is 18 years old, and at that time you can change the name and treat it as a boy from there on, but before that you have to treat it as a girl. [77]

Q. Prior to your return to the village in 1946, you never received such an explanation in your correspondence with your family in China?

A. They never informed me, because I don't believe in the Chinese religion or spirits. I am a Christian. I assume if they told me, I would naturally refuse to carry out such antiquated custom. I would make sure there would be a celebration because it was a boy. Also, I would give it a boy's name if I had known about it.

Q. Did anybody in your family consult a fortune teller with respect to the naming of this child?

A. Yes. There was a fortune teller that my mother consulted after she went through this procedure at the

temple, and the fortune teller also told her the same thing, that if it was a son, it would not live long, that we have to give it a girl's name and raise it as if it is a girl."

A. The Trial Court's Findings Are Not Clearly Erroneous.

In view of the above testimony, which the District Court was entitled to disbelieve, and the interpreter's statements [T. R. 75-76], how can it be said that the findings of the District Court, based on the documentary evidence, were "clearly erroneous"?

Many of the cases cited in appellant's brief are cases where the findings of the District Court were set aside because there was written or documentary evidence contrary to the findings of the court, and the oral testimony was conflicting. In this case the documentary evidence [Gov. Ex. A] supports the court's decision. In order to set aside the finding this Court will have to believe that the fantastic explanation given by the father was true and will have to find it was error for the District Court *not* to believe the father's testimony, and that on the entire evidence this Court has a firm conviction that a mistake has been committed. The weight of the plaintiff's case is not sufficient, and the testimony by interested parties too brief for anyone reading the entire record to be left with any definite conviction that the District Court came to the wrong conclusion.

The following cases are of assistance on this problem:

Quock Ting v. United States (1891), 140 U. S. 417;

Mui Sam Hun v. United States, 78 F. 2d 612;

United States v. Gypsum, 333 U. S. 364;

United States v. Oregon Medical Society, 343 U. S. 326.

In the *Quock Ting* case, Justice Field said at page 420:

> "There may be such an inherent improbability in the statements of a witness as to induce the Court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; . . ."

In the *Mui Sam Hun* case, in an appeal from an order denying a petition for a writ of habeas corpus, where the immigration record was reviewed, the Court said at page 615:

> "The rule is not, as appellant contends, that the applicant need only to make out his case by a fair preponderance of the evidence, for it is not incumbent upon the government to offer any evidence whatsoever. Rather, the burden is upon the applicant to prove his right to admission and the board is the sole judge of credibility of the witnesses, and its finding will not be disturbed without a showing that the hearing was unfair and unreasonable, or that the finding was arbitrary or capricious. The weight of the evidence and the credibility of witnesses is not for us, but for the board."

The opinion of Justice Jackson in the *Oregon Medical Society* case *(supra)* was written in 1952 and quotes the language in the case of *United States v. Gypsum (supra)*. In the *Medical Society* case the District Court dismissed the government's complaint under the Sherman Act, after a long trial, on the ground the Government had proven none of its charges by a "preponderance of the evidence." The trial judge found that no conspiracy to restrain or monopolize medical cases among other findings, and the government asked the Court of Appeals to over-

rule the findings as contrary to the evidence. The Court of Appeals affirmed the District Court's judgment of dismissal and said at page 332:

> "We are asked to review the facts and reverse and remand the case 'for entry of a decree granting appropriate relief.' We are asked in substance to try the case *de novo* on the record, make findings and determine the nature and form of relief. We have heretofore declined to give such scope to our review. *United States v. Yellow Cab Company,* 338 U. S. 338."

The opinion then refers to Rule 52(a) of the Federal Rules of Civil Procedure and concludes at page 339:

> "We conclude that the Government has not clearly proved its charges. Certainly the court's findings are not clearly erroneous. 'A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' *United States v. United States Gypsum Co.,* 333 U. S. 364, 395. The Government's contentions have been plausibly and earnestly argued but the record does not leave us with any 'definite and firm conviction that a mistake has been committed.'
>
> "As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth . . . How can we say the judge is wrong? We never saw the witnesses . . .

> To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd v. Boyd,* 252 N. Y. 422, 429, 169 N. E. 632, 634."

In the *Gypsum* case *(supra)* the District Court granted a motion to dismiss after presentation of the Government's case in a suit by the United States to restrain alleged violations of the Sherman Act. The Court made many findings, and regarding Finding 118, the trial court found that the evidence "fails to establish that defendants associated themselves in a plan to blanket the industry under patent licenses and stabilized prices." After discussing the evidence on the question of conspiracy, the Court says at page 399:

> "The government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents. Both on direct and cross-examination counsel were permitted to phrase their questions in extremely leading form, so that the import of the witnesses' testimony was conflicting. On cross-examination most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous."

The Court also said at page 395:

> "The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial

> court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The *Gypsum* case and *Fleming v. Palmer,* 123 F. 2d 749, cited by appellants, announces propositions which are of value as guides only when applied to the facts of a particular case. In the *Fleming* case the District Court found that the business was controlled by the Palmers and not by the workers. The Court of Appeals, after reviewing the evidence which was largely documentary, for ten or eleven pages of its opinion, concludes:

> "A thorough study of the record has disclosed that Palmer possessed extraordinary powers. Whatever powers he might possibly have lacked were lodged in the group of employees most naturally inclined to be favorable to him. The history of the formation and operation of the cooperative, the Articles of Incorporation and the By-Laws do not reveal an industrial democracy governed by the workers. We have been forced to conclude that the district judge's finding that the workers and not the Palmers controlled the business and this cooperative is against the clear weight of the testimony and must be set aside."

That is a far different case than the present one. It would appear that the Court of Appeals lends greater credibility to documentary evidence as distinguished from oral testimony.

With regard to the cases cited by appellant on the question of discrepancy testimony, the recent opinion of this Court (January 12, 1954) in the case of *Margong v. Brownell,* ..... F. 2d ....., is in point. This Court said:

> "This Court has had occasion recently to uphold the findings made by the trier of facts which refused to credit a witness' testimony even although that testimony is not contradicted. *National Labor Relations Board v. Howell Chevrolet Company,* 204 F. 2d 79, 86 (Affirmed *Howell Chevrolet Co. v. National Labor Relations Board,* ..... U. S. ....., Dec. 14, 1953) (citing other cases in a footnote). Upon the plaintiff's own theory all of the witnesses who testified on his behalf are interested and when viewed in this light their mere say-so does not have to be accepted. (Citing cases.)"

Judge Goodman in the case of *Ly Shew v. Acheson,* 110 Fed. Supp. 50, at 58, states that the rule is that the proof of alleged citizenship must be "clear and convincing." Other cases to this effect are *Lee Fin v. United States* (C. C. A. 2), 218 Fed. 432; *Ex parte Chin Him,* 227 Fed. 131.

The enunciation of rules of proof appears to be of little help. The decision as to whether the plaintiff has sustained his burden to "convince" the Court, is directed to the "conscience" of the Court, and where as in this case, a reading of the full transcript leaves the Court in grave doubt as to whether or not the plaintiff is a citizen, and when, in good conscience the Court cannot make a finding that the plaintiff *is* a citizen, in view of the record, the finding and decision of the District Court that plaintiff is *not* a citizen, should not be set aside.

That the burden is on the appellants to prove their alleged United States nationality has been the view of this Court in the following cases:

Jung Yem Loy v. Cahill, 81 F. 2d 809;

Wong Choy v. Haff, 83 F. 2d 983;

Wong Ying Leon v. Carr, 108 F. 2d 91.

It is respectfully submitted that the decision and the findings of the District Court should be affirmed.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division,

ARLINE MARTIN,
Assistant U. S. Attorney,
Attorneys for Appellee.